Supreme Court, U.S.
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No. 92-1358

In The

Supreme Court of the United States

October Term, 1992

DANIEL WILLIS, CAROLYN WILLIS, HERMAN MENSING, FRANCES MENSING, VINCENT LEWIS, RUBY LEWIS, ELWOOD HAMLET, AND LOIS HAMLET,

Petitioners,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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Two related themes permeate the Brief in Opposition of Respondent The Celotex Corporation ("Celotex"). First, Celotex suggests that the Court should deny review because the Fourth Circuit's decision is unexceptional and in any event does not permanently harm petitioners. Celotex sees nothing odd in the Fourth Circuit's holding that enforcement of a supersedeas bond may be enjoined due to the occurrence of the very event against which it is designed to protect. Moreover, Celotex adds, the Fourth Circuit did not hold that petitioners' bond may never be enforced; it merely held that petitioners must obtain

leave from the bankruptcy court in Florida before seeking enforcement of the bond in the appropriate trial court in Virginia. The two types of harm to petitioners – the additional expense of litigating their claim to the supersedeas bond in bankruptcy court in Florida, and the reality of indefinite delay in obtaining satisfaction of their claim to the bond – are unworthy of this Court's attention, Celotex implies.[1]

Celotex's first argument thus ignores petitioners' contention that the very purpose of a supersedeas bond is to assure that a judgment creditor will not have to become embroiled in bankruptcy proceedings, however "certain" the ultimate result in bankruptcy court may be. As petitioners have emphasized, Rules 62(d) and 65.1 of the Federal Rules of Civil Procedure contemplate that a judgment creditor whose judgment has been stayed pending appeal should be in exactly the same position that the creditor would have been had the judgment been paid when it was entered. To subject judgment creditors who have prevailed on appeal to the vagaries of bankruptcy proceedings would undermine the intent of these rules. The harm to petitioners resulting from the Fourth Circuit's ruling may be belittled by Celotex, but it should not be ignored by this Court. The underlying judgment in this case awards petitioners compensatory damages for severe personal injuries resulting from Celotex's tortious conduct. The judgment in this case was entered some four years ago. In the two and a half years that Celotex's

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[1] After all, Celotex notes, this case involves only an "isolated tort," not the "very complex problems" confronted by the bankruptcy court in the Celotex bankruptcy. Br.Opp. at 7, 6.

bankruptcy has been pending, the bankruptcy court has not allowed a single judgment creditor to collect on a supersedeas bond, though more than 100 such bonds were posted at the time of the bankruptcy. Pet.App. at 8. It would be naive to conclude that the bankruptcy court seeks to exercise jurisdiction over claims such as petitioners' for any reason other than to extort them, through delay, to relinquish part of their claims to achieve a "consensual" reorganization. The Federal Rules, and the Bankruptcy Code, must be interpreted to avoid such a cruel result.

Celotex professes inability to understand how the refusal to honor the supersedeas bond in this case could ultimately lead courts to require additional, and perhaps onerous, security to be posted by judgment debtors in order to obtain stays of execution. Br.Opp. at 6. This prospect did not confuse the Tenth Circuit in *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222, 227 n.3 (10th Cir. 1987); it was the *Grubb* court, not petitioners, that first noted that trial courts would be reluctant to approve a supersedeas bond without assurance that the bond would provide the judgment creditor full protection in the event of the debtor's subsequent bankruptcy. It is true, as Celotex points out, that under Rule 62(d) a stay of execution is available as a matter of right upon the posting of an *approved* supersedeas bond. Br.Opp. at 6. Petitioners point, and that of the Tenth Circuit in *Grubb*, is that approval of a supersedeas bond will no longer be a mere formality if the Fourth Circuit's ruling is maintained and followed. Judgment debtors as well as judgment creditors will suffer.

The second theme of Celotex's brief in opposition is that the petition comes from the wrong court. The question presented by petitioners, Celotex, suggests, should come to the Court not from the Fourth Circuit, but from the Eleventh Circuit upon direct appeal of the bankruptcy court's *ex parte* injunction. In other words, Celotex contends that this Court should decline review of petitioners' collateral attack on the bankruptcy court's injunction (an attack that was upheld by the district court) because petitioners did not appear in bankruptcy court to attack the injunction directly.

Celotex cites no authority for the rather extraordinary proposition that this Court will not entertain collateral attacks on a court's jurisdiction or power unless the aggrieved party first launches a direct attack. On the contrary, this Court frequently considers such collateral attacks, particularly when the aggrieved party was not a party to the proceeding or did not have a fair opportunity to challenge the order that the party is seeking to avoid. *See, e.g., Martin v. Wilks*, 490 U.S. 755 (1989). Celotex's second contention thus begs the question presented in this case. It is petitioners' position that they should not *have* to travel to bankruptcy court in Florida and initiate new proceedings in order to obtain the relief to which they are automatically entitled under the terms of the supersedeas bond and Rule 65.1.

Finally, petitioners would point out that virtually the identical issue raised in this case is under consideration by the United States Court of Appeals for the Fifth Circuit in a case styled *Edwards v. Celotex Corp.*, No. 92-1557. In that case, as in the instant case, the district court agreed with the judgment creditor that the Bankruptcy

Code does not empower a bankruptcy court to interfere with a district court's jurisdiction to allow execution on a supersedeas bond absent a final, enforceable judgment. *See* order entered in *Edwards v. Celotex Corp.*, No. 7-87-0050 (N.D.Tex. May 27, 1992), attached to this brief. The *Edwards* case was argued in the Fifth Circuit on February 18, 1993, and a decision is expected any day. Petitioners submit that the Court should either grant the petition in this case, or defer a final decision on the petition until after the Fifth Circuit issues its opinion in *Edwards*, to assure that the decisions of the Fourth and Fifth Circuits on this important issue are consistent.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS	§	
VS.	§	CIVIL ACTION
	§	NO. 7-87-0050
THE CELOTEX CORPORATION, ET AL.	§	

ORDER

(Filed May 27, 1992)

CAME ON TO BE HEARD plaintiffs' Motion for Release of Supersedeas Bond, and the court, being advised of the premises, is of the opinion that said motion has merit and should be granted. It is therefore

ORDERED that plaintiffs may execute on the supersedeas bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs' favor against the Celotex Corporation in the above styled and numbered cause.

Signed this 27th day of May, 1992.

/s/ David O. Belew
UNITED STATES
DISTRICT JUDGE